

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

February 25, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 96-2201-FT
96-3045-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

In re the Marriage of:

**JENNIFER LOUISE KUNERT,
n/k/a JENNIFER LOUISE CARLSON,**

Petitioner-Appellant,

v.

LYLE HERMAN KUNERT,

Respondent-Respondent.

APPEAL from a judgment of the circuit court for Douglas County:
JOSEPH A. McDONALD, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Jennifer Carlson appeals a judgment of divorce.¹ She challenges the trial court's (1) decision to award primary physical

¹ This is an expedited appeal under RULE 809.17, STATS.

placement of the parties' two children to her former husband, Lyle Kunert; (2) division of insurance proceeds representing household goods and furnishings lost in a fire; and (3) denial of any maintenance. Because the record supports the trial court's exercise of discretion, we affirm the judgment.²

The issues of custody, maintenance and property division are addressed to trial court discretion. *Bahr v. Bahr*, 107 Wis.2d 72, 77, 318 N.W.2d 391, 395 (1982); *Hollister v. Hollister*, 173 Wis.2d 413, 416, 496 N.W.2d 642, 643 (Ct. App. 1992). We will not reverse a discretionary decision if the record discloses that discretion was in fact exercised and we can perceive a reasonable basis for the decision. *Prahl v. Brosamle*, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987). The term "discretion" contemplates a process of reasoning which depends on facts that are in the record or reasonably derived by inference from the record and yields a conclusion based on logic and founded on proper legal standards. *Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20-21 (1981). Generally, we will look for reasons to sustain a discretionary determination. *Prahl*, 142 Wis.2d at 667, 420 N.W.2d at 376.

Underlying discretionary decisions may be factual determinations. *Hollister*, 173 Wis.2d at 416, 496 N.W.2d at 643. A trial court's findings of fact will not be upset unless they are clearly erroneous. Section 805.17(2), STATS. The trial court is the arbiter of the credibility of witnesses, and its assessment of weight and credibility will not be overturned on appeal unless they are inherently or patently incredible or in conflict with the uniform course of nature or with fully established or conceded facts. See *Chapman v. State*, 69 Wis.2d 581, 583-84, 230 N.W.2d 824, 825 (1975).

1. Facts

Jennifer was born on October 16, 1967, and completed twelve years of school. Lyle was born on April 17, 1964, and also completed twelve years of school. The parties' oldest child, a son, was born in 1985, while Jennifer was still in high school. The parties were not married, and Lyle had primary

² The guardian ad litem also filed a brief, arguing that the trial court's findings of fact are erroneous and that the court did not reasonably exercise its discretion. Because the guardian ad litem's concerns were similar to Jennifer's, our opinion responds to the guardian ad litem's issues as well.

physical placement from the time the child was five months to two years. In 1987, their second child, a daughter, was born. The parties married in 1988.

In 1993, the parties separated and in November of 1994 this divorce action was started. At the time of the divorce, Jennifer worked at McDonald's and worked part-time as a bookkeeper. She also was a certified nurse's assistant, but not employed in that capacity. The trial court determined that she earned \$400 per month. Lyle works as a machinist at his father's company earning \$32,000 per year.

Both parties testified that during the marriage there was a lot of fighting. Jennifer testified that Lyle pushed her around and struck her, and she and the children spent time in a shelter. Lyle testified the event that precipitated the divorce was that Jennifer "pulled a gun on me," and in the struggle to get the gun away from her, he pushed her through a wall.³ Lyle testified this incident was "a drinking incident." He testified one night he woke up and Jennifer "had a telephone cord wrapped around my neck."

Lyle testified that he did most of the cooking for the children and the disciplining. He testified that when he and the children would do activities together, like woodcutting, Jennifer did not want to come along. He testified that during the marriage Jennifer drank about a quart of alcohol every two to three days.

In response to a question regarding her present use of alcoholic beverages, Jennifer testified that "[o]nce in a while when I go out for dinner, I'll have one or two fuzzy navels, every two, three months, four months. And once in a while on a weekend when sitting at home with Kenny, I'll have a wine cooler, or its only like two, three ounces of alcohol, and then I drink my Mountain Dew." She testified that although she smoked marijuana and used "speed" for "maybe two months" in high school, she saw a drug counselor, and her alcohol consumption is under control.

Lyle testified that he picked up his daughter and son at noon on Christmas Day. His son was crying, said his neck was sore, was holding his

³ Jennifer testified the gun was not loaded.

neck and it was red. Lyle was on his way to his mother's who lived five to ten minutes away. Lyle's mother testified that when they arrived at her home, her grandson was upset and crying, and she asked, "What's wrong"? Her grandson answered, "My neck hurts." She testified that the boy said "Kenny did it to me." She testified that she took a picture of his neck because there appeared to be bruising and an abrasion. She knew it was not a candy stain because she tried to wipe it off. Lyle reported the incident to the police.

A social worker for Douglas County testified that on December 28, 1995, she received a referral regarding the bruising of the boy's neck. On January 12, 1996, she and a sheriff's department officer went to see the boy at his school and he said that the marks were left by a candy necklace and that his dad told him to say Kenny did it. His sister said that his dad bought candy necklaces for them, and when it left marks, "dad told us to say that Kenny did it." Kenny Yadon is Jennifer's fiancé, with whom she shares her residence. The social worker did not interview the boy's father, mother or Yadon. She did not look at the photograph of the alleged injury. She concluded the allegations of abuse were unsubstantiated.

Lyle's mother testified that she sees the children approximately once a week and has lunch with them or takes them shopping with her. Lyle's father testified that he has spent a lot of time with the children in outdoor activities, teaching the boy to hunt and fish. He helped with school work occasionally and they write out the grocery list together. His wife teaches the girl sewing and crafts. As his son's employer, he testified that "the kids come first" and that he would be flexible with his son's work schedule. He testified that on two or three occasions "the kids would be out on the beach, and she'd be in the cabin, and she had been drinking or something, and all the curtains would be closed and the kids would be out at the end of the dock, and there—it's six feet of water out there and ... neither one could swim, and my dad ... has a house next to there, and my dad would have ... to come out and watch the kids for hours on end."

Raymone Kral, a clinical psychologist and family therapist testified that she met with the children a total of eight times and met with the parents two times. Conflicting testimony was admitted concerning Lyle's office visits. She believed the children were afraid of Lyle. Lyle testified that the children were afraid of therapy with her. Kral testified that it was her opinion

that it would probably be in the children's best interest to live with their mother because they have a real fear of their father.

The court determined that both parents were fit and proper persons to have placement of the children and awarded joint custody with primary physical placement with Lyle. The trial court's reasons include: (1) concern of abuse to the boy by Jennifer's fiancé; (2) a strong extended family on Lyle's side who pitched in and helped with the children; and (3) concern with Jennifer's health as evidenced by past history of alcohol abuse, the testimony regarding fighting and her possession of the gun.

The trial court denied maintenance to both parties. For a property division, it awarded Jennifer \$1,500 representing her share of the household goods and furnishings lost in the fire. The balance of the insurance proceeds were awarded to Lyle. Jennifer appeals.

2. Physical Placement

Section 767.24, STATS., sets forth factors for the trial court to consider in custody and physical placement determinations. The numerous factors include: the wishes of the child and parents; the child's interaction and relationships with parents, siblings, and other persons who may significantly affect the child's best interests; the child's adjustment to home, school, religion and community; the mental and physical health of the parties, the children and others in the proposed custodial household; evidence of abuse of the child; evidence of domestic abuse; problems with alcohol or drug abuse; and such other factors as the court deems relevant. Section 767.24(5), STATS.

Jennifer contends that the trial court erred because it failed to consider the following statutory sections:

A. Section 767.24(5), STATS.

This section provides that the court shall consider the reports of appropriate professionals if admitted into evidence. The trial court specifically referred to a clinical psychologist's testimony in its opinion. The court stated

that it considered all the reports and "the recommendation of the guardian ad litem and everybody else's recommendations." The trial court was not required to accept the opinions of the psychologists or the guardian ad litem. *See Hollister*, 173 Wis.2d at 417-18, 496 N.W.2d at 644. Because the trial court considered the professionals' and experts' opinions, it complied with § 767.24(5), STATS.

B. Section 767.24(5)(i), STATS.

This section provides that the court shall consider evidence of domestic abuse. Although the court did not make specific findings with respect to each of the alleged incidents, its general reference that "the parties have been something" with each other for a long period of time reflects the evidence of long standing domestic violence throughout the duration of the relationship on both sides. The record reflects that the trial court considered the evidence of domestic abuse.

C. Section 767.24(5)(d), STATS.

This section provides that the court shall consider the children's adjustment to school. The trial court noted that it was undisputed that the children needed extra individual attention with respect to school. The court noted Lyle's testimony that he was cut out of some of the school communications when the children went to a new school and was not as responsive as he might have been. However, the court relied on testimony that Lyle and his parents help with school work as best they can. In order to minimize disruption with respect to schoolwork, the court ordered that the transfer of physical placement to Lyle not take place until after the school year ended. The record reflects the court considered adjustment to school.

D. Other factors

Next, Jennifer argues that the trial court erroneously failed to consider numerous other factors, such as the wishes of the children, the wishes of the parents, the children's relationship with the parents, the children's adjustment to the home, school, religion, and community or the availability of child care services. We disagree. When taken in context of the evidentiary

record, the court's decision shows that these factors were not pivotal in its decision making process. For example, because each parent wanted primary physical placement, it was unnecessary for the court to discuss this factor. Also, it was the trial court's prerogative not to heavily weigh the children's wishes, who were ages ten and eight. Although the daughter expressed a preference to live with her mother, Jennifer testified that half the time her son wishes to be with her and half the time he wishes to be with Lyle. The custody investigation indicated it would be in the children's best interests to stay together.

There was no evidence that adjustment to community or religion was a material factor. The court discussed adjustment to school and that Lyle's strong extended family helped with child care. The record does not support Jennifer's claim of error.

E. Section 767.24(6)(a), STATS.

This section provides that if legal custody or physical placement is contested, "the court shall state in writing why its findings relating to legal custody or physical placement are in the best interest of the child." *Id.* Here, the trial court delivered its decision from the bench. Its written judgement incorporated by reference the transcript of the oral decision. The court's oral findings were stated in a general fashion, requiring this court to go to the record for specific facts. Despite the lack of specific factual findings, the record discloses that the court exercised its discretion. The court could conclude that physical placement with Lyle presents a more stable environment. The threat of abuse, the assistance of Lyle's extended family and the concern of alcohol abuse were facts the court could have found from the evidence, even though the issues were contested and contrary findings could have been made. These factual findings demonstrate a reasonable basis for the court's discretionary determination. As a result, the trial court did not commit reversible error.

Next, Jennifer argues that the trial court's findings of fact are erroneous. She contends that the evidence does not support the finding of child abuse by her fiancé. She argues that the court erroneously found that the department "botched" its investigation and the court admitted that it had never

seen a candy necklace, so it wouldn't know if the marks in the photo exhibit were inconsistent with candy necklace stains. We reject this argument.

The assessment of weight and credibility of testimony is a trial court, not appellate court function. *Estate of Wolff v. Town Board*, 156 Wis.2d 588, 598, 457 N.W.2d 510, 513-14 (Ct. App. 1990). The trial court was entitled to find that Lyle's mother's observations were entitled to more weight than the social worker's investigation, which involved only interviews of the children at school two weeks after the incident. The trial court was entitled to give little weight to the investigation.

Jennifer also argues that the trial court erroneously attributed little weight to the testimony of the clinical psychologist, Kral. We disagree. The trial court was entitled to conclude that her opinions, derived from office interviews in a clinical setting, did not fully reflect the numerous factors to be considered in assessing the children's best interests.

Next, Jennifer argues that the trial court failed to consider Jennifer's uncontradicted role as primary care giver. We disagree. Lyle's testimony refuted that Jennifer was the primary care giver throughout the children's lives. Although Jennifer argues that she closely supervises the children with respect to school work. On the other hand, the grandparents' testimony suggested that at times Jennifer's supervision of the children was less than optimal. It is the trial court's function to resolve conflicting testimony and competing inferences. See *id.* at 598, 457 N.W.2d at 513. Appellate courts search the record for evidence to support the findings that the trial court made, not for findings that the trial court could have but did not make. *Estate of Becker*, 76 Wis.2d 336, 347, 251 N.W.2d 431, 435 (1977).

Jennifer points to evidence that Lyle did not know the names of all the children's teachers, and erroneously stated that his son was twelve when in fact he was ten years of age. She contends that the court failed to appropriately weigh the opinions of experts. While we may have accorded different weight to the testimony, and reached a different result were we the trial court, our review of a discretionary determination must be with deference and a recognition that reasonable people could disagree. Based upon the trial court's findings of fact, there exists a reasonable basis for the court's decision to award physical placement to Lyle. Upon review of the record, we are satisfied that the trial

court weighed appropriate factors and that the record discloses a reasonable basis for the exercise of its discretion.

3. Property division.

Next, we reject Jennifer's argument that the trial court erroneously exercised its discretion with respect to property division. Lyle testified that when Jennifer moved from the home, he told her could take the personal property she wanted from the house. He testified that she claimed to have removed all the property that she wanted, except some yarn, a desk and a chair in the basement. He testified that she took the living room furniture, kitchen dishes and other items, sheets, towels, pictures, and wedding gifts.

After the parties divided the personal property in this way, Lyle testified that he had to refurnish the house. He purchased new furnishings, including a couch, tables, chair, lamps, dressers, bedding, a television and children's clothing. After that time, the house burned. Insurance proceeds of \$18,672, representing household goods and furnishings, was paid into court in escrow pending the trial court's decision.

Jennifer testified that at her deposition she stated that she had taken everything out of the house that she felt was hers and that she had left only three things that she felt she was entitled to. At trial, however, she testified that she was entitled to marital property in the home at the time of the fire.

In its oral decision, the trial court observed the "very little testimony or evidence" to go on, and awarded all but \$1,500 of the insurance proceeds to Lyle, stating:

She is entitled as her division of property to be awarded \$1,500 out of the property dispute, because I have no way of valuating what she has. His testimony was that most of it was his, that he purchased after the separation. And the loss is certainly all of his.

Section 767.255(1), STATS., presumes an equal property division, but the trial court may alter the distribution based on other factors the court deems to be relevant. Here, the fire that destroyed the personal property occurred after the parties separated and Jennifer had removed a share of the household furnishings. Lyle replaced the items she removed, and then lost them in the fire. Although the property owned by the parties is all marital property, the trial court concluded that Jennifer was not entitled to one-half of the insurance proceeds because she had removed a share of the marital property before the fire. We conclude that the trial court's decision has a reasonable basis in the record and do not disturb it on appeal.

Jennifer also argues that the trial court originally divided the insurance proceeds equally and later modified this division. She contends that Lyle's post-judgment motion to modify the judgment to obtain an unequal division was untimely because it was more than twenty days after the filing of the judgment. *See* § 805.17(3), STATS. Because the record does not support her argument, we reject it.

The record discloses that the trial court orally delivered its opinion from the bench and that Jennifer's attorney drafted a judgment that did not reflect the court's oral pronouncement. The court signed the judgment on June 19, 1996. Lyle's counsel had not approved of the judgment as to form. On June 25, 1996, Lyle's counsel wrote a letter to the court objecting to the form of the judgment. Because the letter was filed within twenty days of the judgment, it was timely within Section 805.17(3), STATS.

Jennifer argues that the trial court committed an error of law when it construed the letter as a motion. We disagree. Here, the nature of the letter was sufficiently clear in regard to the nature of the relief sought. The trial court was entitled to apply a liberal construction to pleadings. Sections 801.01(2) and 802.02(6), STATS.

3. Maintenance determination.

Jennifer argues that the trial court failed to exercise its discretion with respect to maintenance. Jennifer argues that the trial court failed to consider her financial situation. See *Overson v. Overson*, 125 Wis.2d 13, 18, 370 N.W.2d 796, 798 (Ct. App. 1985). Nonetheless, she fails to explain what that financial situation is and does not cite any record reference demonstrating her need for maintenance.

This was an eight-year marriage. Lyle earns \$32,000 per year. Jennifer earns \$400 per month working at McDonald's and as a bookkeeper. She also is a certified nurse's assistant. She testified that she shares her residence with Kenneth Yadon, to whom she is engaged, and that he is an over the road truck driver who earns an average of \$50,000 per year.

The trial court observed that the parties separated several times during the marriage. The court denied Jennifer maintenance, stating that in view of her engagement and little in the way of contribution to the marriage, an award of maintenance "just doesn't make sense." See §§ 767.26(1), (6) and (9), STATS.

The record supports the trial court's maintenance decision despite the parties' disparate earning capacities. The trial court could reasonably conclude that due to the length of the marriage, the contributions of each party and the paucity of information concerning Jennifer's need for maintenance, none is required. Although the trial court did not specifically articulate its reasons for considering Jennifer's engagement, the record permits the reasonable inference that Jennifer's living expenses would be reduced because she is sharing her residence with her fiancé. See *Vier v. Vier*, 62 Wis.2d 636, 639-40, 215 N.W.2d 432, 433-34 (1974) (We look to the record for reasons to support the trial court's discretionary decision.). We conclude the record supports the trial court's denial of maintenance.

By the Court. — Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.